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Application No.: 10/765,423

Inventor(s): Brian David Hofrichter et al.

Filed: January 27, 2004

Docket No.: 9150

Confirmation No.: 1531

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- 1) Fee Transmittal
- 2) Supplemental Appeal Brief -- 8 pages
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**RECEIVED
CENTRAL FAX CENTER****MAR 27 2007****IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Application No. : 10/301,910
Inventors : Brian David Hofrichter et al.
Filed : January 27, 2004
Art Unit : 1755
Examiner : Lorna M. Douyon
Docket No. : 9150
Confirmation No. : 1531
Customer No. : 27752
Title : Personal Cleansing Composition Containing Irregularly
Shaped Particles and Spherical Particles

APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This Appeal Brief is submitted in support of the Notice of Appeal filed via facsimile on November 17, 2006. Timely filing is provided up to and including January 17, 2007.

REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio.

RELATED APPEALS AND INTERFERENCES

There are no other known related appeals, interferences, or judicial proceedings.

STATUS OF CLAIMS

Claims 1, 3-16 and 20 are pending in the present application. Claim 2 has previously been cancelled for reasons unrelated to patentability. Claims 17-19 have

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been withdrawn from consideration. Claims 1, 3-16 and 20 are rejected. Claims 1, 3-16 and 20 are appealed.

A complete copy of the appealed claims is set forth in the Claims Appendix attached hereto.

STATUS OF AMENDMENTS

All amendments have been entered.

SUMMARY OF CLAIMED SUBJECT MATTER

Claim 1 is directed to a personal cleansing composition comprising from about 5 to about 50 weight percent of a deterative surfactant, from at least about 0.1 weight percent of irregularly shaped particles having a particle size of at least 0.01 micron, from at least about 0.1 weight percent of spherical particles having a particle size of at least 0.01 micron, from about 20 weight percent of an aqueous carrier, and a cationic polymer, wherein the median particle size of said spherical particle is greater than the median particle size of said irregularly shaped particle.

Support for claim 1 may be found at page 2, lines 31-35 and page 3, lines 1-5 of the specification.

GROUND'S OF REJECTION TO BE REVIEWED ON APPEAL

The following grounds of rejection are submitted for consideration on appeal by the Board:

- I. Rejection Under 35 U.S.C. §103(a) Over U.S. Patent No. 5,534,265 to Fowler et al.

ARGUMENTS

In the Office Action of August 18, 2006, the Examiner finally rejected Claims 1, 3-16 and 20 under 35 U.S.C. §103(a) as being obvious by U.S. Patent No. 5,534,265 to Fowler et al. ("Fowler").

- I. Rejection Under 35 U.S.C. §103(a) Over U.S. Patent No. 5,534,265 to Fowler et al.

Claims 1, 3-16 and 20 are finally rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,534,265 to Fowler et al. ("Fowler"). The Office

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Action asserts that Fowler teaches a non-abrasive personal cleansing aqueous gel composition comprising (a) from about 0.1% to about 20% of insoluble particles, (b) from about 0.05% to about 10% of a water soluble or dispersible gelling agent, and (c) from about 20% to about 99.85% water. The Office Action admits that Fowler does not teach a composition comprising irregularly shaped and spherical particles having a weight ratio and median sizes. However, the Office Action asserts that it would have been obvious to one of ordinary skill in the art at the time the invention was made to have prepared personal care compositions comprising a mixture of irregularly shaped particles and spherical particles in their optimum proportions because Fowler teaches that particles having a wide range of shapes can be utilized. Appellants traverse the present rejection based on the following comments.

A. *Prima Facie* Obviousness has not been established because Fowler fails to address the problem which is remedied by Appellants' claimed invention.

In determining the differences between the prior art and the claims, the question under 35 U.S.C. §103 is not whether the differences *themselves* would have been obvious, but whether the claimed invention *as a whole* would have been obvious. Accordingly, a patentable invention may lie in the discovery of the source of a problem even though the remedy may be obvious once the source of the problem is identified. *See MPEP* at § 2141.02. The Office Action asserts that because col. 1, lines 7-9 of Fowler teaches that a personal care composition comprising micronized cleansing particles is useful for cleansing the skin and hair, that routine experimentation would have led one of ordinary skill in the art to Appellants' claimed invention. However, the particles in Fowler are specifically directed to a cleansing benefit. In fact, at col. 3, line 34, Fowler calls the particles, "cleansing particles." Therefore, Fowler does not address the problem of improving volume, body and fullness as taught by Appellants. *See the written description* at page 2, lines 23-26.

B. *Prima Facie* Obviousness has not been established because Fowler fails to provide any motivation to modify the cited reference to produce Appellants' claimed invention.

Obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching,

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suggestion, or motivation to do so found either explicitly or implicitly in the references themselves or in the knowledge generally available to one of ordinary skill in the art. *See MPEP* at § 2143.01. Fowler only teaches that particles having a size greater than about 75 microns are tactilely perceivable and that particles of less than about 1 to about 5 microns are generally less effective for providing a cleansing benefit. *See Fowler* at col. 3, lines 26-33. Therefore, Fowler only provides a motivation to modify particle size, through routine experimentation, in order to optimize cleansing performance. In contrast, Fowler does not teach or suggest that any benefit is achieved by formulating specific shapes or sizes, or combinations of shapes and sizes of particles in its compositions. Therefore, Fowler provides no motivation to one of ordinary skill in the art to optimize particle proportions, because Fowler fails to teach or suggest any correlation between particle proportion optimization and any benefit whatsoever.

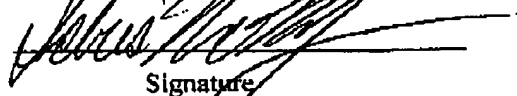
Fowler does not teach or suggest each and every limitation of Appellants' claimed invention. Therefore, Claims 1, 3-16 and 20 are not rendered *prima facie* obvious over Fowler.

SUMMARY

Based on the reasons set forth above, Appellants submit that Claims 1, 3-16 and 20 are patentably distinct from and nonobvious over the cited references. Accordingly, the rejection under 35 USC §103(a) is improper, and Appellants respectfully request the reversal of these rejections by the Board.

Respectfully submitted,

THE PROCTER & GAMBLE COMPANY



Signature

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CLAIMS APPENDIX

The following is a listing of Claims 1, 3-16 and 20, which are the claims involved in the Appeal:

1. (Appealed) A personal cleansing composition comprising:
 - a) from about 5 to about 50 weight percent of a deterative surfactant,
 - b) from at least about 0.1 weight percent of irregularly shaped particles having a particle size of at least 0.01 micron,
 - c) from at least about 0.1 weight percent of spherical particles having a particle size of at least 0.01 micron,
 - d) from about 20 weight percent of an aqueous carrier, and
 - e) a cationic polymer,
wherein the median particle size of said spherical particle is greater than the median particle size of said irregularly shaped particle.
3. (Appealed) The personal cleansing composition of claim [[2]] 1 wherein said cationic polymer has a charge density of from about 1.2 to about 7 meq/g and a molecular weight of from about 10,000 to about 10,000,000.
4. (Appealed) The personal cleansing composition of claim [[2]] 1 wherein said cationic polymer is selected from the group consisting of cationic cellulose derivative and cationic guar gum derivative.
5. (Appealed) The personal cleansing composition of claim [[2]] 1 wherein said cationic polymer has a charge density of from about 1.5 to about 3.0 meq/g.
6. (Appealed) The personal cleansing composition of claim [[2]] 1 wherein said cationic polymer has a charge density of from about 1.7 to about 2.5 meq/g.
7. (Appealed) The personal cleansing composition of claim 1 wherein said spherical particle is selected from the group consisting of spherical polyethylenes, silicone resins, nylons, and mixtures thereof.
8. (Appealed) The personal cleansing composition of claim 1 wherein said spherical particle is a spherical polyethylene.
9. (Appealed) The personal cleansing composition of claim 1 wherein said irregularly shaped particle is selected from the group consisting of metal oxides, silicas, aluminas, and mixtures thereof.
10. (Appealed) The personal cleansing composition of claim 1 wherein said irregularly shaped particle is a precipitated silica.

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11. (Appealed) The personal cleansing composition of claim 1 wherein said spherical particle is from about 0.1 to about 100 microns.
12. (Appealed) The personal cleansing composition of claim 1 wherein said spherical particle is from about 0.5 to about 60 microns.
13. (Appealed) The personal cleansing composition of claim 1 wherein said spherical particle is from about 1 to about 40 microns.
14. (Appealed) The personal cleansing composition of claim 1 further comprising a conditioning agent.
15. (Appealed) The personal cleansing composition of claim 14 wherein the weight ratio of said conditioning agent to total particles of said composition is less than about 2:1.
16. (Appealed) The personal cleansing composition of claim 14 wherein the weight ratio of said conditioning agent to total particles of said composition is less than about 1:1.
20. (Appealed) A method of treating hair or skin by administering a safe and effective amount of the personal cleansing composition of Claim 1.

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EVIDENCE APPENDIX

None.

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RELATED PROCEEDINGS APPENDIX

None.